

BOOK REVIEW

CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS. By JACOB BAZAK. Jerusalem, Israel: Kiriat Sepher, Ltd., 1964. Pp. 276 (with English synopsis appended).

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This is the first comprehensive one-volume study in Hebrew of criminal responsibility. It is efficient, readable, and systematic. It handles creditably the leading foreign works and thoughts on the subject, discusses in some detail the Israeli criminal law, which is mainly codified English Common Law, and even includes a section on Jewish Rabbinical law relating to criminal responsibility. While the author's consideration of criminal responsibility in Anglo-American law contains nothing unfamiliar to an American reader, certain of his novel suggestions deserve comment, as does his rehandling of older materials in an Israeli context.

In 1936 the British mandatory government of Palestine passed the Criminal Code Ordinance, which was actually codified common law. Sections 4, 11, and 14 of that Code interest us. Section 14 introduced M'Naghten's Rule. Section 11, subsection 1, provided generally that "a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will." Section 4 made obligatory on the local courts the principles of interpretation obtaining in England. The courts of Palestine were also inspired by English legal literature as expressed in precedent and learned writings.

Upon the establishment of the State of Israel (May 15, 1948), the law in force, including the criminal law, was retained. However, the Israeli judges felt free to develop their precedents with a greater sensitivity to social needs, especially the immense immigration which poured into the country on a nonselective basis, for whose integration a climate of compassion and toleration of deviation from accepted social norms was thought to be needed. On the other hand, the country faced a difficult security situation and a need for maintenance of order and efficiency in public life which laid a premium on obedience to law and made for nontolerance of deviation from the norms of the criminal law.

At the same time continued experience in adapting the laws to local needs made the courts increasingly independent of English influence, while American legal writing, wherever compatible, was increasingly influential. In this milieu powerful and controversial demands arose for allowing

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greater immunity than that recognized under M'Naghten. The work of the Royal Commission on Capital Punishment, the Draft Model Penal Code of the American Law Institute, and the writings of psychiatrists and criminologists in Anglo-American literature helped to prepare the way for a reappraisal of the M'Naghten Rule as a test for criminal irresponsibility and its supplementation by the Irresistible Impulse test, despite the latter's rejection in English law.

The author, however, proposes a new test of criminal responsibility. His criticism of M'Naghten is orthodox: a failure to supplement the purely intellectual appreciation of right and wrong with a test of control over conduct. Since modern psychiatry recognizes gradations of disturbances from the normal to the abnormal, legal thought should be no less elastic in its approach to the problem of responsibility. There should be diminished responsibility, the author feels, for persons in the intermediate range between clearly sane and clearly insane, but subject to the caveat that where the person is dangerous, the protection of society will be paramount.

Only the principle of Dr. Bazak's proposed test, not its verbal formulation, will be the subject of comment. Its novelty lies in the author's combining in a single test the principle of the Model Penal Code test (at the time of the crime, lack of substantial capacity either to appreciate criminality of conduct or to conform conduct to the requirements of the law) and the principle of the Durham test (no responsibility where criminal conduct was the product of mental disease or mental defect). The proposed test defines "mental disease" in very wide terms to include any mental deficiency or other mental abnormality—whether physiological or psychological in origin—resulting in any of the influences described in the text.

This reviewer thinks that the two principles are probably irreconcilable. The first principle places greater value on the protection of society and the maintenance of the norms of conduct among the law-abiding by limiting exemption from criminal responsibility as far as the judge and jury, representing the sense of justice of the community, will allow. This is the result under a formula which leaves to the finders of law and fact the decision as to when considerations of public policy justify a conclusion of blamelessness. Durham, in contrast, places greater value on consideration of the individual as a person vis-a-vis society. Furthermore, though allowing for the use of, and reliance on, medical expert evidence, the Model Penal Code test leaves the weight of judgment to the court; Durham eventually transfers to the expert decisive weight in the decision, since the determination as to whether a criminal act was the product of mental disease is eminently for the expert.

Dr. Bazak is aware that the second part of his test (substantially Durham) gives very wide discretion to the court without any guidance, but he suggests that the inclusion of the first (Model Penal Code) part of his test, which does contain such a directive, will orient the court toward application of its discretion in the context of the guidance provided by the

first part. Furthermore, he suggests that the first part will serve additionally as a safeguard against "overstrict" courts who may desire to limit unduly their wide discretion with the purpose, for example, of denying a defendant the defense of irresistible impulse.

This proposal lends itself to two kinds of criticism: one directed against the Durham principle itself which now, about ten years after its pronouncement, has been followed by no American court except Vermont and the Virgin Islands; the second criticism relates to the author's failure to connect the two parts of his test.

Most objections to the Durham test arise from its lack of any standard to determine when the action of a defendant or a diagnosis by a medical expert is sufficient to establish that the defendant was suffering from a defect or disease severe enough to absolve him. Similarly the proposed test, in its second part, speaks of the act as a "product" of the disease, but offers no indication in its wording as to the type of relation required quantitatively or qualitatively between the two.

Although the author purports to join the two definitions, he in fact leaves them unrelated. He terms them "complementary," but they are not. For the "overstrict" judge, to use the author's term, part two is unnecessary, and part one is the appropriate instruction; for the "overlenient" judge, part one is no legal restriction, and it is doubtful whether it will at all mitigate the wide discretion under part two.

The last part of the book deals briefly with the Jewish Rabbinical law. It is interesting to note that the great medieval writer Maimonides, whose contributions span philosophy, theology, and medicine, describes the insane person as including not only one who is wandering in the streets unshaved and undressed, but also "anyone who is confused in mind, invariably mixed up with respect to some matters, although with respect to other matters he speaks to the point and asks pertinent questions" ¹ The author discusses the reasons given for legal immunity in the Rabbinical law and notes that the most common reason is "unsoundness of mind."

In conclusion it bears repetition that the book constitutes on the whole an efficient, readable compilation of relevant material on the question of criminal responsibility. The author's basic belief is persuasive: justice should not be left to develop itself from case to case, but rather an attempt should be made to find a formula that will take into account the entire complex of changing conditions and developing knowledge.

¹ 14 MAIMONIDES, CODE (MISHNEH TORAH)—THE BOOK OF JUDGES 101 (3 Yale Judaica Series, Hershman transl., 1949) (rule of evidence).